

**Letter of Findings: 04-20140684  
Gross Retail Tax  
For the Years 2011, 2012, and 2013**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

### HOLDING

The price paid by an Indiana distribution business for the purchase of software training was not subject to Indiana sales or use tax because the training did not constitute tangible personal property.

### ISSUE

#### **I. Gross Retail Tax - Computer Software and Training.**

**Authority:** IC § 6-2.5-2-1(a); IC § 6-2.5-1-2; IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-2-2](#); [45 IAC 2.2-3-4](#).

Taxpayer argues it is not responsible for paying sales or use tax on the price it paid for "remote training" associated with its purchase of computer software.

### STATEMENT OF FACTS

Taxpayer is an Indiana business which distributes products to its customers. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in an assessment of additional sales and use tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representative explained the basis for the protest.

#### **I. Gross Retail Tax - Computer Software and Training.**

### ISSUE

The issue is whether Taxpayer was required to pay sales tax to its vendor of computer software on the ground that a portion of the price it paid was for exempt training services.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "when [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to an agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this decision, as well as the preceding audit, are entitled to deference.

#### **A. Audit Results.**

Because of the sheer number of transactions which occurred during the period under audit, the Department selected 2012 as "representative of the entire audit period." In reviewing the 2012 records, the audit assessed

additional tax because Taxpayer did not obtain either an "exemption certificate or direct pay permit . . . ." On arriving at an "error rate" for 2012, that rate was then applied to "total Indiana sales for the period 2011 and 2013 . . . ."

In making the assessment, the audit cites as its authority [45 IAC 2.2-2-2](#) which provides:

The retail merchant, acting as an agent for the state of Indiana, must collect the tax. The tax is borne by the customer. Consideration is a necessary element of taxable transaction[s].

The audit also assessed additional use tax. In reviewing Taxpayer's own purchases, "the audit did note some areas of noncompliance that included cleaning supplies, office supplies, and other items." The audit relied on [45 IAC 2.2-3-4](#) as authority for assessing use tax on these items. The regulation provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property unless the Indiana state gross retail tax has been collected at the point of purchase.

### **B. Taxpayer's Response.**

Taxpayer objects - in part - to the assessment of use tax on payments made to a company called Datacor and purportedly attributable to the purchase of a "Chempax C/S License Agreement."

Taxpayer points to the software licensing agreement with Datacor and specifically to "Appendix E" labeled "License Agreement Pricing." The page specifies that charges due pursuant to the agreement including a charge of \$44,800 for "Training/Implementation." The agreement details the extent of the training provided. "The training program is very detailed with extensive hands-on practice." "[S]ome of the training might include remote training which utilizes effective technologies such as Citrix and Webex."

The total cost of the licensing contract is \$105,000. Taxpayer agrees that it owes use tax on the cost of the software (\$60,200) but maintains that it was not subject to use tax on the price it paid for the training.

### **C. Hearing Analysis.**

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1 . . . or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." (Emphasis added).

Taxpayer has provided documentation establishing that it entered into an agreement with Datacor to purchase software and training services. The documentation establishes that the cost of the training was billed separately from the cost of the software, that these training expenses were accounted for separately in its dealings with the vendor, and that the cost paid for the training does not represent the purchase of "tangible personal property" subject to Indiana sales or use tax.

## **FINDING**

Taxpayer's protest is sustained.

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